SJC-12709

COMMONWEALTH vs. JAMES L. ADAMS.

Middlesex. September 5, 2019. - September 9, 2020.

Present: Gants, C.J., Lenk, Gaziano, Lowy, Budd, Cypher, & Kafker, JJ.

Rape. Joint Enterprise. Constitutional Law, Double jeopardy, Waiver of constitutional rights. Collateral Estoppel. Deoxyribonucleic Acid. Evidence, Joint venturer, Relevancy and materiality. Practice, Criminal, Double jeopardy, Collateral estoppel.

Indictments found and returned in the Superior Court Department on October 25, 2011.

The cases were tried before Sandra L. Hamlin, J.

The Supreme Judicial Court on its own initiative transferred the case from the Appeals Court.

Scott A. Katz for the defendant.
Kate Cimini, Assistant District Attorney, for the Commonwealth.

GAZIANO, J. The defendant was indicted on nine counts of forcible rape of a child and one count of contributing to the delinquency of a minor. He was charged as a principal in three

of the counts of rape, and as a joint venturer in three counts of rape where Calvin Spencer was charged as a principal, and three where Joseph Brown was so charged.[1] After a jury trial, the defendant was acquitted on all counts in which he had been charged as a principal, and all counts alleging oral rape where he had been charged as a joint venturer. He was convicted of contributing to the delinquency of a minor. The jury were unable to reach a verdict with respect to the remaining four counts. Before attempting to retry the defendant, the Commonwealth conducted extensive additional deoxyribonucleic acid (DNA) testing on the clothing the victim had been wearing, and at the retrial, the Commonwealth introduced the results of some of those additional tests. At his second jury trial, conducted by the same judge, the defendant was convicted as a joint venturer in vaginal and anal rapes committed by his two coventurers.

On appeal, the defendant argues that subjecting him to a second trial violated the constitutional protection against double jeopardy. Specifically, he contends that, because he was acquitted of oral rape as a joint venturer, the jury at his first trial necessarily found that he was not a joint venturer as to any of the rapes, and thus he could not be retried on the

[1] The three counts for each defendant alleged one count each of vaginal, oral, or anal rape.

other counts involving joint venture. The defendant maintains as well that certain evidence, in particular, the DNA test results from his first trial, as well as the subsequent testing, should not have been admitted. After careful review of the record at both trials, we affirm the convictions.

1. Facts. Because the defendant's double jeopardy claim depends on the evidence presented at his first trial, we recount that evidence in some detail, viewing it in the light most favorable to the Commonwealth; where the evidence at the two trials differed substantively, we indicate those differences.

In April, 2011, the fourteen year old victim was a patient in a residential treatment program at McLean Hospital (McLean) and was attending school on the McLean grounds. On April 5, 2011, the victim had a pass to go to Boston for a Portuguese lesson. She left McLean at approximately 3:30 P.M., and traveled by bus and by Massachusetts Bay Transportation Authority (MBTA) trains on the Red and Green Lines to a coffee shop near Boston University. When the victim arrived at approximately 5:30 or 6 P.M., she believed that she might have been "a little late" for the meeting. After waiting briefly for her instructor, who did not appear, the victim rode the Green Line back to downtown Boston. She went to the MBTA's South Station, hoping to buy drugs for a friend at McLean who had given her money to do so.

Unable to find any cocaine to purchase, the victim rode a Red Line train back to Harvard Square. She eventually arrived at an area near the Harvard Square MBTA station known as "the pit," where she hoped to be able to purchase drugs. There, she met four men: Armando Hernandez, Spencer, Brown, and the defendant.[2] She told them that she was nineteen years old and a college student. After talking with the victim for some time, the four men walked toward Harvard Yard. The victim followed, hoping that they were going to a place where they would have drugs. When the men got onto a bus, the victim went with them.

On the bus, the men passed around bottles of liquor. The victim drank most of a bottle of brandy. Hernandez, who had suffered a recent injury, produced a prescription bottle, took a Percocet pill, and gave one or more pills to Spencer. Spencer, Brown, the defendant, and the victim got off the bus near Central Square; Hernandez did not get off with them. By that time, the victim was feeling lightheaded and dizzy. One of the men went to a liquor store, and the victim and the other two men crossed the street to an apartment building on Massachusetts Avenue.[3] When someone left the building, the group went inside.

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[2] At trial, the victim identified three of the men by distinguishing characteristics: a tall man (Brown), a short man (Spencer), and a man carrying a white Blackberry or similar mobile device (the defendant).

They went upstairs in the elevator, and arrived in an area with a series of hallways that were unlit except for a light coming from a bathroom located at one end. They sat on the floor in the hallway; at some point Spencer rejoined them. One man gave the victim a Percocet; they also all smoked marijuana.[4] The victim took ten or eleven puffs; thereafter, she felt "very unaware of everything," and unable to think. At that point, the bathroom light was off.

The man sitting next to the victim asked her if she had ever "been with" a black man. She replied that she had not, then apparently passed out. When she came to, most of her clothing had been removed. The victim was unable to move her own body much. One of the investigating officers testified that the defendant told police that two men (Spencer and Brown) were having sex with the victim at the same time, and in different ways, moving her into different positions. The same officer testified that the defendant told him that he had masturbated while Spencer and Brown had sex with the victim. The victim testified that she was "in and out of passing out"; at one point, she heard one of the men ask another if she were dead.

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[3] The victim did not identify the man at the first trial; at the second trial, she indicated that it had been the short man, Spencer, who had gone to the liquor store.

[4] The victim testified that she had not previously taken a Percocet or smoked marijuana.

The assaults "just stopped" thirty minutes after they had begun; the victim was clear on the time, because she "checked [her] phone."

The men helped the victim dress. By then she was able to walk to the elevator by leaning on someone. The three men took her to the elevator and went downstairs with her. One of the men walked her to the Central Square MBTA stop; at that point, she was able to "walk in a straight line."[5] The man asked if he could call her the following day; she said "sure."[6] He also told her that "it would be better next time if you weren't so drunk." The victim rode a Red Line train from Central Square to Harvard Square. She arrived at approximately 9 P.M., thought that she was well in time to return to McLean as scheduled, sat down on the floor of the station, and slept on and off for about one-half hour. When she woke up, she sent a text message to a friend, who testified as a first complaint witness. The victim then called her program and asked someone to pick her up at the Harvard Square station because she would be late returning if she took the bus.

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[5] At the first trial, the victim did not identify the man who walked her to Central Square. At the second trial, the victim indicated that it had been the man with the Blackberry (the defendant).

[6] At the second trial, the victim testified that she gave the man who walked her home her cellular telephone number and he sent her a text message to confirm that it was the right number.

Later that evening, the victim went to an emergency room. A doctor there observed bruising on her labia and cervix and a tear on her hymen. She also had a rug burn on her back, from when she had been lying on her back, and felt pain in her rectum. At trial, the doctor testified about the collection of evidence from the victim's body and her clothing, as well as to the effect of the combination of the drugs and alcohol the victim had consumed.

Approximately two weeks after the incident, Cambridge police conducted an identification of the defendant through a photographic array. They examined the victim's cellular telephone, surveillance video footage from the Central Square and South Station MBTA stations, and surveillance video recordings from the apartment house on Massachusetts Avenue; investigators also examined and took samples from the hallway in the building, to which the victim was able to lead them. The hallway contained numerous stains from bodily fluids on the carpet, moldings, and walls, but forensic testing yielded nothing useful for the defendant's case.

During an interview, the defendant told police that he had been present at the scene and had masturbated while watching the other men; he was able to describe the men's actions, but denied having sex with the victim himself and denied that she had been forced. The defendant's and the victim's statements to police

were introduced at trial through testimony by an investigating officer.

DNA testing was performed on samples obtained from swabs of the victim's body and some of her clothing. The testing was divided into sperm and non-sperm portions. The non-sperm portion of the vaginal swab yielded one DNA profile that matched the victim. The sperm portion contained a mixed profile; within that, the major profile matched Spencer, and the defendant and Brown were excluded as potential contributors.[7] The victim's bra (that and her shoes were the only items of clothing that she was still wearing when she woke up) contained amylase[8] but not sperm cells. The defendant matched the major DNA profile obtained from the bra,[9] and the victim and Spencer were included as potential contributors to the minor profile; Brown was excluded. The sperm fraction of the sample from the victim's tank top was a single source that matched Spencer. The victim matched the profile of the major contributor to the mixed, non-sperm

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[7] The probability of a random individual matching the profile was one in 319.5 trillion of the Caucasian population, and one in 298.3 trillion of the African-American population. All of the coventurers were African-American.

[8] Amylase is a component of saliva that also may be present in breast milk, urine, and feces.

[9] The probability of a random individual matching the major profile was 1 in 116.4 billion of the Caucasian population, and 1 in 2.467 billion of the African-American population.

fraction, and the defendant and Spencer could not be excluded as potential contributors to the minor profile; Brown was excluded. No sperm or seminal fluid was found in samples taken from the victim's mouth.

After the jury were unable to reach a verdict on some of the charges, the Commonwealth conducted more extensive DNA testing on the victim's skirt and the front and back panels of her underwear. In this testing, Spencer was identified as the major profile in the sperm fraction of the testing, and the defendant could not be excluded[10] from the sperm fraction of a mixture on the underwear that contained DNA from at least three men. The defendant also could not be excluded from a non-sperm mixture on the victim's skirt and her tank top, by comparable ratios to those of the underwear.

2. Discussion. a. Waiver. As a threshold matter, we note that the defendant raised his double jeopardy claim for the first time on appeal; he did not file a motion to dismiss the indictments on double jeopardy grounds prior to his retrial. Relying on Commonwealth v. Spear, 43 Mass. App. Ct. 583 (1997), the Commonwealth argues that the double jeopardy claim therefore

[10] The mixture of three men from which the defendant and Spencer could not be excluded would have matched 5,062 out of 5,426 African-American men in the database, and 6,209 Caucasians.

is waived, and the court should not consider it. We do not agree.

In Spear, 43 Mass. App. Ct. at 584-585, as here, the defendant's first trial ended in a mistrial as to some charges, and the defendant did not move to dismiss those charges before his second trial. After he was convicted at his second trial, the defendant argued on direct appeal that his right to be protected against being subject to double jeopardy had been violated. Id. In those circumstances, the Appeals Court held "that by failing to assert the defense of double jeopardy prior to his second trial, the defendant waived the right to do so" on appeal, id. at 587; accordingly, the court expressed no view on the merits of the defendant's double jeopardy claim. Id. at 587 n.6.

In subsequent similar cases, the Appeals Court has done likewise; in no case has it considered whether such a claim raises a substantial risk of a miscarriage of justice. See Commonwealth v. Davis, 83 Mass. App. Ct. 484, 493 (2013); Commonwealth v. Green, 52 Mass. App. Ct. 98, 101-102 (2001). Cf. Commonwealth v. Bennett, 52 Mass. App. Ct. 905, 906 (2001) (double jeopardy claim was waived, but it would not have succeeded on merits). We nonetheless have observed that the law concerning double jeopardy waiver is "not entirely clear," see

Commonwealth v. Carlino, 449 Mass. 71, 76 n.13 (2007), and cases cited, and take this opportunity to clarify it.

The Appeals Court's decision in Spear, 43 Mass. App. Ct. at 584-585, 587, was decided before we held that "[a]ll claims, waived or not, must be considered." See Commonwealth v. Randolph, 438 Mass. 290, 293 (2002). To be sure, there are differences in how we evaluate the consequences of an error -- i.e., if we determine there was error, how we determine whether the defendant is entitled to any relief -- depending on whether the claim was raised and properly preserved in the trial court or whether it was waived.[11] Regardless of how, ultimately, we determine the consequences of an error, the important point for present purposes is that our prevailing practice is to consider all of the claims that are argued before us, including waived

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[11] For claims that were raised and properly preserved, we generally consider whether the error was "prejudicial" or "harmless," see Commonwealth v. Vinnie, 428 Mass. 161, 163 (1998); Commonwealth v. Flebotte, 417 Mass. 348, 353 (1994), or, in the case of constitutionally-rooted claims, whether the error was "harmless beyond a reasonable doubt," see Commonwealth v. Tyree, 455 Mass. 676, 700-701 (2010); Vinnie, supra. For claims that were not raised or properly preserved, we examine whether the error gave rise to "a substantial risk of a miscarriage of justice." See Commonwealth v. Alphas, 430 Mass. 8, 13 (1999), citing Commonwealth v. Freeman, 352 Mass. 556, 564 (1967).

Other standards are applicable in cases involving preserved claims of structural error, see Commonwealth v. Williams, 481 Mass. 443, 454 (2019), and in direct appeals from convictions of murder in the first degree, see Commonwealth v. Wright, 411 Mass. 678, 681-682 (1992), S.C., 469 Mass. 447 (2014).

claims, provided the record before us is sufficient to enable us to do so.

In sum, we do not follow the Appeals Court's approach in Spear and its progeny. Although the defendant indeed did waive his claim by not asserting it in the Superior Court, we nonetheless consider the claim and ask whether a substantial risk of a miscarriage of justice arose from retrying the defendant on the four remaining charges.

Although we conclude that a double jeopardy claim must be considered even if it is raised for the first time after a defendant's retrial, it is distinctly advantageous to a defendant to raise such a claim before retrial. Otherwise, the defendant risks not only an erroneous conviction, but also the irremediable loss of the right not to be tried twice for the same offense. See Costarelli v. Commonwealth, 374 Mass. 677, 680 (1978), quoting Abney v. United States, 431 U.S. 651, 660-661 (1977). That also is why we routinely provide appellate review of double jeopardy claims before a retrial, where a defendant seeks relief under G. L. c. 211, § 3, from the denial of a motion to dismiss on double jeopardy grounds, brought after the defendant's trial ended in a mistrial, but before the retrial. See, e.g., Pinney v. Commonwealth, 479 Mass. 1001, 1001 (2018); Commonwealth v. Hebb, 477 Mass. 409, 409-410

(2017). See also Neverson v. Commonwealth, 406 Mass. 174, 175-176 (1989).

b. Double jeopardy. Turning to the substance of the defendant's claim, the defendant argues that, in acquitting him of oral rape by joint venture, the jury necessarily found that he was not a joint venturer at all, and that this finding therefore precluded a retrial. The defendant's argument arises from "the issue-preclusion component of the [d]ouble [j]eopardy [c]lause, [under which], 'when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit.'" See Bravo-Fernandez v. United States, 137 S. Ct. 352, 356 (2016), quoting Ashe v. Swenson, 397 U.S. 436, 443 (1970). "[T]he double jeopardy clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior trial." Yeager v. United States, 557 U.S. 110, 119 (2009), citing Ashe, supra.[12]

The United States Supreme Court first articulated this principle in Ashe, 397 U.S. at 445-447. The defendant in that case was charged with several counts of armed robbery arising

[12] "Unlike the United States Constitution, the Massachusetts Declaration of Rights does not include a double jeopardy clause, but our statutory and common law have long embraced the same principles and protections." Kimbroughtillery v. Commonwealth, 471 Mass. 507, 510 (2015).

from a single incident in which a group of masked men broke into a house and robbed six people who were playing poker. Id. at 437-438. He first was tried only on the charge of robbing one of the victims. Id. at 438. According to the Court, "[t]he proof that an armed robbery had occurred and that personal property had been taken from [the first victim] as well as from each of the others was unassailable. . . . But the State's evidence that the [defendant] had been one of the robbers was weak." Id. The defendant was acquitted. Id. at 439. Over the defendant's objection, he was tried a second time, this time for the robbery of one of the other victims. Id. at 439. At the second trial, the defendant was convicted notwithstanding the first jury's apparent determination that the defendant had not been one of the robbers. Id. at 440. The Court held that the second trial violated collateral estoppel[13] principles embodied in the double jeopardy clause. Id. at 444-445. In doing so, the Court explained that to determine whether a second trial is precluded, a court must, "with realism and rationality, . . . 'examine the record of [the] prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded

[13] Our jurisprudence equates the terms "collateral estoppel" and "issue preclusion." See, e.g., Commonwealth v. Martinez, 480 Mass. 777, 788 (2018); Commonwealth v. Rodriguez, 476 Mass. 367, 375 (2017).

its verdict upon an issue other than that which the defendant seeks to foreclose from consideration'" (citation omitted). Id. at 444.

Having examined the record of the defendant's first trial, the Court observed, see id. at 445:

> "[T]he record is utterly devoid of any indication that the first jury could rationally have found that an armed robbery had not occurred, or that [the first victim] had not been a victim of that robbery. The single rationally conceivable issue in dispute before the jury was whether the [defendant] had been one of the robbers. And the jury by its verdict found that he had not. The [F]ederal rule of law, therefore, would make a second prosecution for the robbery of [the second victim] wholly impermissible."

Unlike in Ashe, 397 U.S. at 438-439, the defendant here was not tried on the various charges seriatim; he was tried simultaneously on all of the charges and was acquitted on some, but the jury were unable to reach a verdict on the remainder. A similar circumstance was before the United States Supreme Court in Yeager, 557 U.S. at 119. In that case, the defendant was tried on multiple counts of five Federal offenses, which, for simplicity, the Court referred to as the "fraud counts" and the "insider trading counts." Id. at 113-114. After a lengthy trial, the jury acquitted the defendant on the fraud counts but were unable to reach a verdict on the insider trading counts. Id. at 114-115. The defendant claimed that the acquittals were the result of the jury's finding that he had not had any insider information, a fact that also was critical to the insider

trading counts, and therefore the government was precluded from retrying him on those counts. Id. at 115. A lower appellate court had ruled that a retrial was not precluded; that court reasoned that if the jury had made such a finding, they would not have been unable to reach a verdict, but instead would have acquitted the defendant on the insider trading counts. Id. at 116.

The United States Supreme Court, however, rejected this reasoning:

> "A hung count is not a 'relevant' part of the 'record of [the] prior proceeding.' . . . Because a jury speaks only through its verdict, its failure to reach a verdict cannot -- by negative implication -- yield a piece of information that helps put together the trial puzzle. . . . A host of reasons -- sharp disagreement, confusion about the issues, exhaustion after a long trial, to name but a few -- could work alone or in tandem to cause a jury to hang. To ascribe meaning to a hung count would presume an ability to identify which factor was at play in the jury room. But that is not reasoned analysis; it is guesswork. Such conjecture about possible reasons for a jury's failure to reach a decision should play no part in assessing the legal consequences of a unanimous verdict that the jury did return" (footnotes omitted).

Yeager, 557 U.S. at 121-122, quoting Ashe, supra at 444.

The Yeager Court thus concluded "that the consideration of hung counts has no place in the issue-preclusion analysis." Yeager, 557 U.S. at 122. Under the holding in Yeager, therefore, we may not draw the seemingly obvious inference that, as the jury reached deadlock rather than outright acquitting the defendant of the vaginal and anal rapes as a joint venturer,

they must not have found that he was completely innocent of those offenses. We must disregard the counts where the jury were unable to reach a verdict, and examine the record of the first trial "with realism and rationality," Ashe, 397 U.S. at 444, to determine whether there was any rational basis for the first jury's decision to acquit the defendant of the oral rapes, other than a finding that he was not a joint venturer as to the entire incident. See id. It is the defendant's burden "'to demonstrate that the issue whose relitigation he seeks to foreclose was actually decided' by [the first] jury's verdict of acquittal." Bravo-Fernandez, 137 S. Ct. 352, 359 (2016), quoting Schiro v. Farley, 510 U.S. 222, 233 (1994).

The evidence at the first trial established that the victim had been raped and that the defendant was present at the scene, along with Brown and Spencer. Indeed, the defendant told police that he had seen Brown and Spencer having sex with the victim, and said that she had not been forced. The age of the victim, and her intoxicated condition, also were not live issues at trial. The primary question for the jury, as to each joint venture indictment, was whether the man alleged to be the principal assailant committed the charged vaginal, oral, or anal rape. The jury had to make this determination based on slim evidence specifically connecting each man to each act. Although she knew that, at certain points, two men were performing sex

acts on her simultaneously, the victim was unable to specify which men raped her. In addition, while the victim testified that she could feel someone ejaculating in her mouth, emergency room physicians found no sperm or other DNA evidence there.

Reading the record with "realism and rationality," Ashe, 397 U.S. at 444, we conclude that the defendant's acquittal on the charge of oral rape by joint venture was at least as likely to have been the result of the jury's inability to determine, beyond a reasonable doubt, whether Brown and Spencer had each committed an oral rape as it was to have been the result of a determination that the defendant was not a joint venturer at all.

The defendant argues that it was essentially undisputed that the victim was orally raped by two of the three men present. Because he was acquitted of oral rape as a principal actor, the jury must have found that it was Brown and Spencer who committed the oral rapes, and the defendant's acquittal as a joint venturer indicated that he did not share their intent. As discussed, however, the evidence at the first trial was at best equivocal on this point. Indeed, the defendant's own closing argument emphasized the paucity of evidence that he or Brown had "any kind of sex with" the victim. Moreover, even if the jury did, as the defendant suggests, find that he was not a joint

venturer as to the oral rapes, it does not follow that he was not a joint venturer as to the alleged vaginal and anal rapes.

In sum, the defendant has not carried his burden of proving that the issue whether he was a joint venturer with respect to the vaginal and anal rapes was actually was decided at his first trial. Accordingly, there was no error, let alone any substantial risk of a miscarriage of justice, in retrying the defendant on those charges.

c. Admissibility of evidence. Before his second trial, the defendant filed a motion in limine seeking to exclude all testimony and DNA evidence tending to show that he personally committed any of the rapes. He argued that because he had been acquitted as a principal of all charges, allowing such evidence would violate collateral estoppel principles derived from the guarantee against double jeopardy. The motion was denied. The defendant now challenges the admission, at his second trial, of the victim's testimony that "at least" two of the three men had raped her orally,[14] which, he argues, suggested that all three

[14] At the first trial, the victim testified that she was raped by two of the men. At the second trial, the victim testified that there had been at least two men having sex with her at one time. The victim testified at the second trial:

Q.: "[W]as there any way for you to distinguish between the men that were having sex with you in the hallway?"

A.: "I could tell with the penises in my mouth that at least one was hairier and at least one was a lot more shaven."

Q.: "But were you able to tell whether there were just two or whether there were three different penises?"

A.: "I was not able to tell. But it was definitely at least two different ones."

The following day, she testified:

Q.: "So you testified yesterday that you could tell that there were at least two men because there were some distinctions between them?"

A.: "Yes."

. . .

Q.: "[S]o you said that there were at least two men that forced their penises into your mouth. Was this something that only happened twice or did it happen more than that?"

A.: "Several times."

Q.: "Okay. And how do you know it was several times?"

A.: "Because there were at least two different like feeling . . . like in my throat, I could feel like two different ones."

In addition, the prosecutor used similar language without objection in her closing argument, stating, for example, that "there were at least two different men raping" the victim, and that "what the evidence does show is that at the least, [the defendant] participated, that he aided, he assisted his friends, that he tried to help make the rapes succeed." To the extent the defendant challenges the closing argument, we find no substantial risk of a miscarriage of justice.

might have done so, and of evidence, not admitted at the first trial, that the defendant's DNA was found on the victim's underwear and skirt.[15] There was no further objection at trial.[16]

The United States Supreme Court has held that the collateral estoppel component of the double jeopardy clause in the Federal Constitution does not bar "relevant and probative evidence that is otherwise admissible under the Rules of Evidence simply because it relates to alleged criminal conduct for which a defendant has been acquitted." See Dowling v. United States, 493 U.S. 342, 348 (1990). Nor does such evidence violate the Federal due process clause. Id. at 352-354. For purposes of the Massachusetts Constitution, however, this court

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[15] Between the two trials, additional samples of the victim's clothing were tested. Seminal fluid, including sperm cells, was found on her skirt and on the interior front and rear panels of her underwear. As to the skirt, the sperm fraction matched only Spencer, but the defendant could not be excluded as a potential contributor to the non-sperm fraction. As to the front panel of the underwear, while the major profile of the sperm fraction matched Spencer, there was insufficient information to identify other contributors. The defendant could not be excluded as a contributor to the non-sperm fraction. As to the rear panel of the underwear, the defendant was included as a potential contributor to the minor profile of the sperm fraction.

[16] The second trial predated our decision in Commonwealth v. Grady, 474 Mass. 715, 716-717 (2016), in which we ruled, for prospective purposes only, that a motion in limine can be sufficient to preserve an objection regardless of whether it is based on constitutional or other grounds. Here, however, the defendant asserted a constitutional ground for excluding evidence, and so we treat the issue as preserved.

has rejected the Court's holding in Dowling, and has found Justice Brennan's dissent in that case persuasive. See Commonwealth v. Dorazio, 472 Mass. 535, 546-547 (2015).

In Dorazio, supra at 536, a case decided after the defendant's second trial in this matter, the defendant was tried for sex offenses against two victims. At trial, a young girl, J.D., testified that the defendant had assaulted her, in an unrelated incident, during the same general period of time and in a similar manner. Id. at 538. J.D.'s testimony was introduced as prior bad act evidence, to demonstrate absence of accident or mistake, notwithstanding that the defendant had been acquitted at a prior trial of assaulting J.D. Id. at n.7. In addition, J.D.'s father and a police officer also testified about this alleged incident. Id. at 538-539.

In that case, we noted that, under Federal rules, such evidence might be admissible because the standard of proof for the introduction of bad act evidence -- more likely than not -- is much lower than the standard of proof beyond a reasonable doubt. Dorazio, 472 Mass. at 543. We concluded however, "that the collateral estoppel protections necessarily embraced by art. 12 [of the Massachusetts Declaration of Rights] warrant the exclusion of the acquittal evidence in the circumstances of this case, a subsequent criminal proceeding involving alleged sexual conduct with minors." Id. at 547. We observed that the Dowling

court's "hypertechnical" approach to collateral estoppel "offends the principles of the presumption of innocence, the significance of being treated 'legally innocent' that results when the prosecution fails to prove a defendant guilty beyond a reasonable doubt, and notions of fairness and finality." Id. at 547-548.

Here, however, some of the evidence the defendant challenges is materially different from the type of evidence that was admitted improperly in Dorazio. The victim did not affirmatively testify at the defendant's second trial that the defendant himself had raped her, nor did the prosecutor argue that the defendant had done so. Indeed, on cross-examination by defense counsel, the victim testified that she could not say with any certainty that the defendant was one of the men who had raped her. In our view, the victim's use of the phrase "at least" does not bear the weight the defendant places on it. In context, the victim's words reflect her effort to testify accurately concerning her memory of the incident, and do not suggest an insinuation that the defendant engaged in physical conduct of which he had been acquitted. The victim testified that she had passed out and come to multiple times, and that her memory was "very choppy" or "fragmented," and she emphasized that she was not sure of the number of times certain acts took place or the particular individuals involved, or the order of

the acts, before clarifying, for example, that an act had occurred "at least three" times. There was no error in the admission of the victim's testimony.

With respect to the new DNA evidence, however, the question is different. The additional DNA testing indicated that the defendant was excluded as a potential contributor to the mixed minor sperm profile on the back panel of the victim's underwear, containing a mixture of three males, in which Spencer matched the major profile.[17] The defendant also could not be excluded as a contributor to the mixed, non-sperm fractions elsewhere on the underwear, on the victim's tank top, and on the victim's skirt. See notes 7, 9, and 10, supra. This evidence was not relevant to whether the defendant had participated as a joint venturer in the vaginal and anal rapes. And unlike the defendant's argument as to the acquittal of oral rape as a finding that he did not participate at all as a joint venturer, this evidence did introduce for the jury's consideration "facts determined in the defendant's favor at the first trial." See Dorazio, 472 Mass. at 545, quoting Commonwealth v. Benson, 389 Mass. 473, 478, cert. denied, 464 U.S. 915 (1983). Just as in Dorazio, supra at

[17] Within the mixed "minor" profile, the defendant's DNA was the "major profile." The likelihood of the appearance of this profile was 1 in 1,961 African-American males, 1 in 1,255 Asian males, 1 in 2,242 Caucasian males, and 1 in 1,171 Hispanic males.

548, the DNA evidence tended to establish that the defendant personally had committed the rapes, or had had sexual contact with the victim, and required the defendant to some extent to defend against the charges of involvement as a principal on which he had been acquitted. It was of a different character, and more incriminating, than the DNA evidence from the victim's body that had been introduced at the first trial, from which the defendant was excluded, and that also was admitted at the second trial. The additional DNA evidence should not have been introduced.

Nonetheless, introduction of the additional DNA evidence did not prejudice the defendant. The defendant's DNA was not a match for any of the samples taken from the victim's body. The prosecutor elicited testimony that the presence of the defendant's DNA on the underwear and other clothing could be explained by his removing a condom (he told police that he had worn one initially while masturbating) and then handling the garments. As noted, the victim did not identify the defendant as one of her direct assailants. And the prosecutor, in her closing argument, did not assert that the defendant had personally committed any of the rapes, but only argued forcefully that the defendant was guilty of rape by joint venture. The jury were instructed properly on the elements of joint venture liability, and that each indictment specifically

alleged that either Brown's or Spencer's penis penetrated the victim's vagina or anus.

Most significantly, the expert's testimony emphasized that the major profile in the sperm fraction on the victim's underwear and skirt matched Spencer, with the possibility of another individual matching that same profile as one in 3.536 trillion African-Americans in the population. He described the fact that the defendant's DNA was "an inclusion" on the rear panel of the underwear as follows:

> "So we were able to have enough of this sample to -- to do -- gain some more information on that minor profile in the rear panel to see -- you know, we know we have a major male matching Calvin Spencer, but can you -- can we gain more information about what remains in that minor."

This did not tend to point to the defendant as a principal in the rapes or to focus the jury's attention on the possible presence of the defendant's DNA. In addition, other than the one point on the rear panel of the underwear,[18] the mixed non-sperm samples from which the defendant could not be excluded also would have included approximately eighty-seven percent of the male population in the United States (4,747 out of a database of 5,426 males or 2,471 out of a database of 2,858 males). Thus, while improper, the admission of the additional

[18] Approximately 1 in 1,961 African-American males would have matched the minor profile. See note 17, supra.

DNA evidence likely would not have had an effect on the jury's verdict.

Judgments affirmed.